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## LAI CHENG OOI v. LIM SAN PEEN & ANOR AND OTHER APPEALS

FEDERAL COURT, KOTA KINABALU
MD RAUS SHARIF CJ
BALIA YUSOF WAHI FCJ
B JEFFREY TAN FCJ
[APPLICATIONS NO: 08(i)-297-06-2017,
08(i)-300-06-2017 & 08(i)-301-06-2017]
28 MAY 2018

C ***CIVIL PROCEDURE:*** *Jurisdiction – High Court – Setting aside order of another High Court of concurrent jurisdiction – Principle that judge has no power to set aside order of another judge of concurrent jurisdiction – Whether applicable to ex parte orders – Rules of Court 2012, O. 32 r. 6*

D ***COMPANY LAW:*** *Winding up – Liquidation – Proceedings against company in liquidation – Whether proceedings could only be commenced with leave of court – Applicant obtained ex parte leave but leave was subsequently set aside – Whether action could still be proceeded against company and receiver – Companies Act 1965, s. 226(3)*

E The appellant/applicant of the leave application herein was the widow and executor of Lee Tain Eshung ('deceased') who held 60% of the equity of Tamparuli Granite Quarry (Sabah) Sdn Bhd ('Tamparuli') which was subsequently wound up. The deceased was a bankrupt at the time of his death. Prior to the winding up, Tamparuli entered into a sale and purchase agreement with Naslei Enterprise Sdn Bhd ('Naslei') to purchase a property.
F Tamparuli paid part of the purchase price, whilst further sum was set off against materials supplied by Tamparuli. Subsequently, receivers were appointed to manage Naslei and there was a High Court order that no action could be maintained against Naslei or its receivers without the leave of court.
It was the applicant's complaint that the receiver failed to complete the
G purchase of the property and that the Inland Revenue Department informed her that her right to secure the property had been forfeited because of insufficient funds. The applicant thus sought, in the High Court: (i) a declaration that the termination of the agreement and forfeiture of initial payments by Naslei were null and void; (ii) a declaration that the agreement
H was valid and subsisting; and (iii) a direction that Naslei complete the sale of the property, upon payment by the applicant through the receiver, of the balance purchase price. The trial court held that the applicant lacked the *locus standi* to challenge the decision of the Director General of Insolvency ('DGI') and that the applicant had no leave of court to commence the action
I against Naslei. The applicant appealed to the Court of Appeal. The Court of Appeal imparted the facts that pursuant to her *ex parte* applications, the

applicant obtained leave to commence an action against Tamparuli, Naslei and the receivers of those companies. With leave, *albeit* obtained *ex parte*, the applicant commenced an action for specific performance (BKI-22NCvC-91/8-2015) against Naslei and receiver, Tamparuli and receiver, and Danaharta Urus Sdn Bhd. All the defendants applied under O. 18 r. 19 of the Rules of Court 2012 ('ROC') to strike out the action. Naslei and receiver applied to set aside the *ex parte* leave. The High Court allowed the application to set aside the *ex parte* leave and the action was subsequently struck out. The Court of Appeal ruled in favour of the respondents on the ground that the applicant lacked the *locus standi* to challenge the decision of the DGI, and that there was no leave of court to commence the action against Naslei and receiver and Tamparuli and receiver. Hence, the application for leave to appeal on the following questions of law: (i) whether the time-honoured and established principle of law that the High Court Judge has no power or jurisdiction to set aside an order of another High Court Judge regularly granted in the exercise of concurrent jurisdiction as enunciated in the classic Federal Court case of *Hock Hua Bank Bhd v. Sahari Mat* be overruled; and (ii) whether the High Court has the power and jurisdiction to strike out the writ of summons in Suit No BKI-22NCvC-91/8-2015 under O. 18 r. 19 of the ROC which was filed and submitted in the name of the Yang di-Pertuan Agong of Malaysia.

**Held (dismissing leave application with costs)**
**Per Jeffrey Tan FCJ delivering the judgment of the court:**

**(1)** Section 226(3) of the Companies Act 1965 provided that 'when winding up order has been made or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced except with the leave of court'. That equally applied to an action or proceeding against the receiver of a company under liquidation. When the *ex parte* leave was set aside, there was no longer the requisite leave of court to proceed with the action. Therefore, the action could no longer be proceeded with against Naslei and receiver and Tamparuli and receiver. The action could be struck out on that ground alone without the necessity to consider the *locus standi* of the applicant. (paras 14 & 15)

**(2)** The principle that a judge has no power or jurisdiction to set aside an order of another judge of concurrent jurisdiction does not apply to *ex parte* orders. An order made *ex parte* may be regular, in that, it was made within jurisdiction. But that does not mean that an *ex parte* order could not be set aside, be it by the same or different judge of the court which granted the *ex parte* order. Hence, the leave questions, even if allowed to be argued in full, could not succeed. (paras 16 & 17)

A ***Bahasa Malaysia*** *Translations*

Perayu/pemohon dalam permohonan kebenaran di sini adalah balu dan wasi Lee Tain Eshung ('si mati') yang memegang 60% ekuiti dalam Tamparuli Granite Quarry (Sabah) Sdn Bhd ('Tamparuli') yang kemudiannya digulungkan. Si mati bankrap pada masa dia meninggal dunia. Sebelum
B digulungkan, Tamparuli memasuki satu perjanjian jual beli dengan Naslei Enterprise Sdn Bhd ('Naslei') untuk membeli suatu harta. Tamparuli membayar sebahagian harga belian, manakala jumlah selebihnya akan ditolak daripada barangan yang akan dibekalkan oleh Tamparuli. Selepas itu, penerima dilantik untuk menguruskan Naslei dan terdapat perintah
C Mahkamah Tinggi bahawa tiada tindakan boleh dikekalkan terhadap Naslei atau penerimanya tanpa kebenaran mahkamah. Aduan pemohon adalah bahawa penerima gagal menyelesaikan pembelian harta dan bahawa Jabatan Hasil Dalam Negeri memaklumkan kepadanya bahawa hak pemohon untuk mendapatkan harta telah dibatalkan kerana kekurangan dana. Oleh itu,
D pemohon memohon di Mahkamah Tinggi: (i) satu deklarasi bahawa pembatalan perjanjian dan penyitaan bayaran awal oleh Naslei adalah batal dan tidak sah; (ii) deklarasi bahawa perjanjian tersebut sah dan kekal; dan (iii) arahan bahawa Naslei menyelesaikan jualan hartanah itu, setelah pembayaran baki harga belian oleh perayu melalui penerima. Mahkamah
E bicara memutuskan bahawa pemohon tiada *locus standi* untuk mencabar keputusan Ketua Pengarah Insolvensi ('KPI') dan bahawa pemohon tiada kebenaran mahkamah untuk memulakan tindakan terhadap Naslei. Pemohon merayu ke Mahkamah Rayuan. Mahkamah Rayuan mendedahkan fakta bahawa berikutan permohonan *ex parte*, pemohon memperoleh kebenaran untuk memulakan tindakan terhadap Tamparuli, Naslei dan penerima-
F penerima syarikat tersebut. Dengan kebenaran, walaupun diperoleh *ex parte*, pemohon memulakan satu tindakan bagi pelaksanaan spesifik (BKI-22NCvC-91/8-2015) terhadap Naslei dan penerima, Tamparuli dan penerima dan Danaharta Urus Sdn Bhd. Kesemua defendan memohon bawah A. 18 k. 19 Kaedah-Kaedah Mahkamah 2012 ('KKM') untuk membatalkan tindakan.
G Naslei dan penerima memohon untuk mengetepikan kebenaran *ex parte*. Mahkamah Tinggi membenarkan permohonan untuk mengetepikan kebenaran *ex parte* tersebut dan tindakan itu kemudian dibatalkan. Mahkamah Rayuan memutuskan berpihak pada responden-responden atas alasan bahawa pemohon tiada *locus standi* untuk mencabar keputusan KPI
H dan bahawa tiada kebenaran mahkamah untuk memulakan tindakan terhadap Naslei dan penerima dan Tamparuli dan penerima. Oleh itu, permohonan untuk kebenaran untuk merayu atas soalan undang-undang berikut: (i) sama ada prinsip undang-undang sejak zaman berzaman dan matan iaitu Hakim Mahkamah Tinggi tiada kuasa atau bidang kuasa untuk mengetepikan suatu
I perintah Hakim Mahkamah Tinggi yang diberikan secara teratur dalam

pelaksanaan bidang kuasa serentak seperti yang dinyatakan dalam kes Mahkamah Persekutuan *Hock Hua Bank Bhd v. Sahari Murid* diakas; dan (ii) sama ada Mahkamah Tinggi mempunyai kuasa dan bidang kuasa untuk membatalkan writ saman dalam Guaman No BKI-22NCvC-91/8-2015 bawah A. 18 k. 19 KKM yang difailkan dan dikemukakan atas nama Yang di-Pertuan Agong Malaysia.

**Diputuskan (menolak permohonan kebenaran dengan kos)**
**Oleh Jeffrey Tan HMP menyampaikan penghakiman mahkamah:**

**(1)** Seksyen 226(3) Akta Syarikat 1965 memperuntukkan bahawa 'apabila perintah penggulungan dibuat atau pelikuidasi sementara dilantik, tiada tindakan atau prosiding boleh diteruskan atau dimulakan kecuali dengan kebenaran mahkamah'. Ia terpakai secara sama rata bagi tindakan atau prosiding terhadap penerima syarikat dalam likuidasi. Apabila kebenaran *ex parte* diketepikan, tiada lagi kebenaran mahkamah yang diperlukan untuk meneruskan tindakan tersebut. Oleh itu, tindakan itu tidak boleh lagi diteruskan terhadap Naslei dan penerima dan Tamparuli dan penerima. Tindakan tersebut boleh dibatalkan semata-mata atas alasan tersebut tanpa keperluan untuk mempertimbangkan *locus standi* pemohon.

**(2)** Prinsip bahawa hakim tiada kuasa atau bidang kuasa untuk mengetepikan perintah hakim lain dengan bidang kuasa serentak tidak terpakai bagi perintah *ex parte*. Suatu perintah *ex parte*, boleh jadi teratur, di mana, ia dibuat dalam bidang kuasa. Tetapi ia tidak bermakna suatu perintah *ex parte* tidak boleh diketepikan, sama ada oleh hakim yang sama atau hakim lain mahkamah yang memberikan perintah *ex parte*. Oleh itu, soalan kebenaran, walaupun dibenarkan untuk dihujahkan secara penuh, tidak mungkin berjaya.

**Case(s) referred to:**
*Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC* ***(refd)***
*Hock Hua Bank Bhd v. Sahari Murid [1980] 1 LNS 92 FC* ***(refd)***
*Malaysian International Trading Corporation Sdn Bhd v. RHB Bank Bhd [2016] 2 CLJ 717 FC* ***(refd)***
*Selvam Holdings (Malaysia) Sdn Bhd v. Grant Kenyon & Eckhardt Sdn Bhd; BSN Commercial Bank Malaysia Bhd & Ors (Interveners) [2000] 3 CLJ 16 CA* ***(refd)***
*Tai Kwong Goldsmiths & Jewellers (in receivership) v. Yap Kooi Hee & Ors [1994] 4 CLJ 959 SC* ***(refd)***

**Legislation referred to:**
Companies Act 1965, ss. 216, 226(3), 279
Rules of Court 2012, O. 18 r. 19, O. 32 r. 6
Rules of the High Court 1980, O. 32 r. 6, O. 92

**Other source(s) referred to:**
Jeffrey Pinsler, *Singapore Court Practice 2017,* vol 1, para 32/3/4

A *(Application No: 08(i)-297-06-2017)*
*For the appellant - Tai Choi Yu; M/s CL Lim & Co*
*For the 1st respondent - S Vanugopal; M/s S Vanugopal & Partners*

*(Application No: 08(i)-300-06-2017)*
*For the appellant - Tai Choi Yu; M/s CL Lim & Co*
B *For the 1st & 2nd respondents - S Vanugopal; M/s S Vanugopal & Partners*
*For the 3rd & 4th respondents - Monica Lin Sua; State Insolvency Office Director, Sabah*
*For the 5th respondent - Wong Heu Fun; M/s Leong & Wong*

*(Application No: 08(i)-301-06-2017)*
*For the appellant - Tai Choi Yu; M/s CL Lim & Co*
*For the 1st respondent - S Vanugopal; M/s S Vanugopal & Partners*
C

*[Editor's note: For the Court of Appeal judgment, please see Lai Cheng Ooi (F) v. Lim San Peen & Anor And Other Appeals [2017] 1 LNS 1390 (affirmed).]*

*Reported by S Barathi*

D

## JUDGMENT

**Jeffrey Tan FCJ:**

**[1]** On 13 April 2018, we heard and unanimously dismissed the application for leave to appeal on the following "questions of law":

E (a) Whether the time-honoured and established principle of law that a High Court Judge has no power or jurisdiction to set aside an order of another High Court Judge regularly granted in the exercise of concurrent jurisdiction as enunciated in the classic Federal Court case of *Hock Hua Bank Bhd v. Sahari Murid* [1980] 1 LNS 92; [1981] 1 MLJ 143 be overruled?

F (b) Whether the High Court has the power and jurisdiction to strike out the writ of summons in Suit No BKI-22NCvC-91/8-2015 under O. 18 r. 19 which was filed and submitted in the name of the Yang di-Pertuan Agong of Malaysia?

G **[2]** The background facts could be summarised as follows. The applicant of this leave application, Lai Cheng Ooi, is the widow and executor of Lee Tain Eshung (deceased) who held 60% of the equity of Tamparuli Granite Quarry (Sabah) Sdn Bhd (Tamparuli). On 10 May 1983, Tamparuli entered into a sale and purchase agreement (agreement) with Naslei Enterprise Sdn H Bhd (Naslei) to purchase property described as "1202 Waikiki Condominiums" (property). Tamparuli paid RM304,000 towards the purchase price of RM970,000. The applicant contended that Naslei admitted that a further sum of RM208,886 was set off against materials supplied by Tamparuli.

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**[3]** On 19 January 1989, receivers were appointed to manage Naslei. On 19 July 1991, the High Court ordered that no action could be maintained against Naslei or its receivers without the leave of court. On 23 November 2001, the deceased was adjudged a bankrupt and remained a bankrupt on the date of his death on 14 June 2008. On 6 February 2014, the applicant obtained probate to the estate of the deceased. On 18 October 2011, Tamparuli was wound up on the petition of the Government of Malaysia.

**[4]** The applicant complained that the receiver failed to complete the purchase of the property. The applicant averred that she was ready, willing, and able to pay the balance purchase price. The applicant contended that though she was given notice, she was not allowed to attend the meeting of the creditors of Tamparuli, that the Inland Revenue Department told her that her right to secure the property had been forfeited, that by letter dated 25 March 2014 she was informed that because of insufficient funds, the receiver had no intention to complete the purchase of the property, and that Naslei forfeited the initial payments. The applicant further contended that that asset of Tamparuli was given up to the detriment of Tamparuli. At the trial court, learned counsel for the applicant argued that the intention of the applicant to complete the purchase of the property should have been considered by the creditors; apparently, the applicant was allowed to complete the purchase of another property by the deceased in his own name.

**[5]** At the trial court, the applicant sought (a) a declaration that the termination of the agreement and forfeiture of monies paid were null and void; (b) a declaration that the agreement was valid and subsisting; (c) a direction that Naslei do complete the sale of the property, upon payment by the applicant through the receiver, of the balance purchase price.

**[6]** Naslei and the receiver of Tamparuli raised two objections to the action.

**[7]** The first objection of Tamparuli was that pursuant to s. 216 of the Companies Act 1965 read together with the provisions of the Bankruptcy Act 1967, the applicant had no standing to complain about the manner in which the affairs of Tamparuli was administered by the receiver in his capacity as the liquidator. The trial court held that by reason of s. 216 of the Companies Act 1965, the Director-General of Insolvency (DGI) became the contributory of Tamparuli, and that the grant of probate did not entitle the applicant to claim that she was a contributory of Tamparuli or the legal representative of the deceased with respect to the shareholding of the deceased in Tamparuli. The second objection of Tamparuli was that pursuant to s. 226(3) of the Companies Act 1965, no action or proceeding could be proceeded with or commenced against Tamparuli without the leave of court.

A The trial court held that s. 226(3) of the Companies Act 1965 did not apply, as the action was against the receiver and not against the company. However, the trial court held that under s. 279 of the Companies Act 1965, the applicant had no *locus standi* to challenge the decision of the DGI.

B **[8]** The objection of Naslei was that the leave of court was not obtained to commence the action against Naslei, in accord with the order of court dated 9 July 1991. The trial court upheld that objection and held that Naslei should be struck out as a defendant.

C **[9]** Essentially, the trial court held that the applicant lacked the *locus standi* to challenge the decision of the DGI, and that the applicant had no leave of court to commence the action against Naslei. The applicant appealed to the Court of Appeal.

D **[10]** Pertinent to the leave of court to commence action against Tamparuli and or Naslei, the Court of Appeal imparted the following facts. On 19 June 2015 and 18 August 2015, the applicant, pursuant to her *ex parte* applications, obtained leave to commence action against Tamparuli, Naslei, and the receivers of those companies. With leave, *albeit* obtained *ex parte*, the applicant commenced action for specific performance (BKI-22NCvC-91/8-2015) against Naslei and receiver, Tamparuli and receiver, and Danaharta Urus Sdn Bhd. All defendants applied under O. 18 r. 19 of the Rules of Court E 2012 to strike out the action. Naslei and receiver applied to set aside the *ex parte* leave. Meantime, the striking out application was stayed pending disposal of the application to set aside the *ex parte* leave. On 23 March 2016, the High Court (a different judge) set aside the *ex parte* leave. On 25 August 2016, the action was struck out.

F **[11]** In paras. 8 and 9 of its judgment, the Court of Appeal noted that (a) the order dated 9 July 1991 stated that "no action, application shall be commenced, continued or maintained against (Naslei) and or the court appointed receivers and managers thereof without first leave of this court being obtained", (b) the judge who set aside the *ex parte* leave recorded in the G notes of proceedings that the order of 9 July 1991 was not brought to the attention of the judge who granted the *ex parte* leave, and (c) the judge who set aside the *ex parte* leave recorded in the notes of proceedings that Naslei should have been served with notice of the application for leave.

H **[12]** In paras. 10 and 11 of its judgment, the Court of Appeal related that the applicant argued that (a) the High Court was *functus officio*, as the order granting *ex parte* leave had been sealed and perfected, (b) the High Court had no power or jurisdiction to set aside the order of another High Court Judge of concurrent jurisdiction, and (c) the defendants should have appealed against the *ex parte* leave or instituted separate proceedings to impeach the I *ex parte* leave.

**[13]** To those arguments, the Court of Appeal held that (a) any *ex parte* order is liable to be set aside, (b) the High Court was not *functus officio*, (c) it is not mandatory to appeal or file separate proceedings to impeach an *ex parte* order (the Court of Appeal referred to *Selvam Holdings (M) Sdn Bhd v. Grant Kenyon & Eckhardt Sdn Bhd; BSN Commercial Bank Malaysia Bhd & Ors (Interveners)* [2000] 3 CLJ 16; [2000] 3 MLJ 201), (d) an order obtained in breach of the rules of natural justice can be set aside in the same proceedings, (e) the applicant was in breach of the order dated 9 July 1991, (f) no action can be brought against a receiver without the leave of court (the Court of Appeal referred to *Tai Kwong Goldsmiths & Jewellers (in receivership) v. Yap Kooi Hee & Ors* [1994] 4 CLJ 959; [1995] 1 MLJ 1), and (g) the setting aside of an *ex parte* order is an exception to the general rule that an order perfected and sealed cannot be set aside in the same action; errors can be corrected to reflect the intention of the court, (h) it did not matter that the *ex parte* leave was set aside by a different judge, as either judge had the jurisdiction to set aside an *ex parte* order, (i) since *ex parte* leave was granted in the absence of parties who ought to have been heard, it became one of the exceptions to the general rule as to *functus officio*, (j) *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75, which was cited by the applicant, was of no assistance to the applicant, and (k) whatever assets of Tamparuli belonged to Tamparuli and not to shareholders; the applicant had no cause of action to enforce the agreement entered by Tamparuli.

**[14]** Evidently, there was leave of court, *albeit* made *ex parte*, to commence the action against Naslei and receiver, and Tamparuli and receiver. But when the *ex parte* leave was set aside, that was no longer the requisite leave of court to proceed with the action against Naslei and receiver, and Tamparuli and receiver. The action was commenced with the leave of court. But when the *ex parte* leave was set aside, the action could no longer be proceeded with against Naslei and receiver, and Tamparuli and receiver. Both courts below ruled in favour of the respondents on the ground that the applicant lacked the *locus standi* to challenge the decision of the DGI, and that there was no leave of court to commence the action against Naslei and receiver, and Tamparuli and receiver.

**[15]** We were however of the view that when the *ex parte* leave was set aside, the action could no longer be proceeded with against Naslei and receiver and Tamparuli and receiver. The action could be struck out on that ground alone without the necessity to consider the *locus standi* of the applicant. Section 226(3) of the Companies Act 1965 (repealed by Companies Act 2016) provided that "when a winding up order has been made or a provisional liquidator has been appointed no action or proceeding shall be proceeded with or commenced except with the leave of court". That equally applied to an action or proceeding against the receiver of a company under liquidation. In *Tai Kwong Goldsmiths*, the former Supreme Court per

A VC George J, as he then was, delivering the judgment of the court, held that "no action could be brought against a receiver, in his capacity as such, ... without the leave of the court and if such an action or proceeding is brought without leave, its further prosecution will be restrained".

B **[16]** When the *ex parte* leave was set aside, it produced the result that there was no leave of court to proceed with the action, such that the applicant could only proceed with the action, if leave were applied afresh and granted, or if the order setting aside the *ex parte* leave were set aside. The applicant opted to attack the order setting aside the *ex parte* leave. Leave question 1 proposed that it was "the time-honoured and established principle of law that C a High Court Judge has no power or jurisdiction to set aside an order of another High Court Judge regularly granted in the exercise of concurrent jurisdiction as enunciated in the classic Federal Court case of *Hock Hua Bank Bhd v. Sahari Murid* [1980] 1 LNS 92; [1981] 1 MLJ 143 be overruled". But with respect, the principle that a judge has no power or jurisdiction to set D aside an order of another judge of concurrent jurisdiction does not apply to *ex parte* orders. Any "order made *ex parte* may be set aside (see O. 32 r. 6 of the Rules of Court 2012) by the same judge or court which granted the *ex parte* order, or by a different judge of the same court which granted the *ex parte* order. For that clear position in law, we need only to refer to the recent E decision of *Malaysian International Trading Corporation Sdn Bhd v. RHB Bank Bhd* [2016] 2 CLJ 717; [2016] 2 MLJ 457, where it was held by the Federal Court per Suriyadi FCJ, delivering the judgment of the majority, that "jurisdictionally, a court under O. 32 r. 6 of the RHC or under O. 92 of the RHC, may set aside any *ex parte* order". Under O. 32 r. 6 of the Rules of Court 2012, any judge of the same court has jurisdiction to set aside any *ex* F *parte* order. "This is necessary in the interest of justice as the party who was not heard may wish to object to the order" (Singapore Court Practice 2017 by Jeffrey Pinsler Vol. 1 at para. 32/3/4).

**[17]** An order made *ex parte* may be regular, in that it was made within jurisdiction. But that does not mean that an *ex parte* order could not be set G aside, be it by the same or different judge of the court which granted the *ex parte* order. The proposed leave questions, even if allowed to be argued in full, could not possibly succeed. It was for the aforesaid reasons, that we dismissed the leave application with costs.

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